B. Purpose of Apportionment.

1. Funds are apportioned to prevent obligation at a rate that would require a deficiency or a supplemental appropriation. As a general rule, an agency may not request an apportionment that will indicate a need for such appropriations. 31 U.S.C. § 1515.

2. Apportionment at a rate that would require a deficiency or supplemental appropriation is permitted by 31 U.S.C. § 1515 for:

a. Military and civilian pay increases;

b. Laws enacted after budget submission which require additional expenditures; or

c. Emergencies involving life or property.

3. An agency also violates the apportionment statutes if a drastic curtailment of agency activity is necessary to enable it to complete the fiscal year without exhausting its appropriation. To Honorable John D. Dingell, 64 Comp. Gen. 728 (1985); To the Postmaster General, 36 Comp. Gen. 699 (1957).

V. ADMINISTRATIVE DIVISION OF APPORTIONMENTS - *31 U.S.C. § 1514.*

A. Administrative Fiscal Controls. **The head of each executive agency is required to establish a system of administrative controls that will (1) restrict obligations or expenditures to the amount of apportionments and (2) enable the agency to fix responsibility for exceeding an apportionment. The pertinent regulations are:**

1. Instructions on Budget Execution, OMB Circular A-34, para. 31.5. This circular applies to all agencies and requires OMB approval of fund control systems.

2. Administrative Control of Appropriations, DoD Directive 7200.1. See also DoD Accounting Manual 7220.9-M, Part II, Chapters 21-28.

3. Army Accounting and Fund Control, *DFAS 37-1; NAVCOMPT 7300.101; MCO P4200.15, MCO P7300.8; AFR 177-16, Section C.*

B. Subdivisions of Funds under AR 37-1. DFAS 37-1, Glossary, Section II. See AFR 177-16, para. 20.

1. Allocations and Allo oD, these terms denote a formal subdivision of funds below an apportionment. In hese formal subdivisions are transmitted on a nputer generated form (DA 1323) called a Funding Authorization Document.

VI. APPROPRIATION AND FUND CONTROLS

A. Further Limitations on Expenditures or Obligations. *31 U.S.C. § 1341.*

1. An officer or employee may not make or authorize an obligation or expenditure exceeding an amount available in an appropriation or fund. *31 U.S.C. § 1341(a)(1)(A).* The Honorable Glenn English, House of Representatives, B-223857, Feb. 27, 1987 (unpub.).

a. The scope of this statute is broader than that of the apportionment statutes. It includes appropriations not subject to apportionment (e.g., expired appropriations).

b. The GAO has opined that this statute prohibits not only obligations in excess of appropriated amounts, but also obligations that violate statutory restrictions or other limitations on obligations or spending. *Reconsideration of B-214172, 64 Comp. Gen. 282 (1985);* Customs Service Payment of Overtime Pay in Excess of Limit in Appropriation Act, *60 Comp. Gen. 440 (1981).*

2. An officer or employee may not involve the government in a contract or obligation for payment of money before an appropriation is made unless authorized by law. *31 U.S.C. § 1341(a)(1)(B);* Propriety of Continuing Payments Under Licensing Agreement, *66 Comp. Gen. 556 (1987)* (20 year agreement violated this provision because the agency had only a one-year appropriation); To the Secretary of the Air Force, *42 Comp. Gen. 272 (1962).*

3. An officer or employee may not make or authorize an expenditure or obligation or involve the government in a contract for the payment of money required by law to be sequestered. *31 U.S.C. § 1341(a)(1)(C) and (D).*

4. A contracting officer may obligate in excess of, or contract in advance of, an appropriation if authorized by law.

a. Statutory authority must specifically authorize entering into a contract prior to, or in excess of, an appropriation. The Army Corps of Engineers Continuing Contracts, *56 Comp. Gen. 437 (1977)77-1 CPD para. 265;* To the Secretary of the, Air Force, *42 Comp. Gen. 272 (1962).*

(1) Example: *41 U.S.C. § 11* permits DoD and the Coast Guard to contract for clothing, subsistence, forage, fuel, quarters, transportation or medical and hospital supplies for the current fiscal year.

b. Requirements and indefinite quantity contracts funded by annual appropriations may extend into the next fiscal year if any specified minimums are certain to be ordered in the initial fiscal year, and the contract includes the clause at *FAR 52.232-19*, Availability of Funds for the Next Fiscal Year.

c. The government may not accept supplies or services under these contracts until the contracting officer has given notice that funds are available.

6. Some specific Antideficiency Act issues.

a. A violation of the Bona Fide Needs statute, *31 U.S.C. § 1502*, may result in a violation of *31 U.S.C. § 1341.*

b. A violation of the Purpose Statute, *31 U.S.C. § 1301(a),* may also result in a violation of *§§ 1341 or 1517*. To the Honorable Bill Alexander, U.S. House of Representatives, *63 Comp. Gen. 422 (1984).* Obligation of funds for an improper purpose does not create an antideficiency violation if:

(1) Proper funds were available at the time of the erroneous obligation;

(2) Proper funds were continuously available after the erroneous obligation was incurred; and

(3) Proper funds were available when the erroneous obligation was discovered and corrected. See *DFAS 37-1, para. 7-9.*

c. Contracts providing for indeterminate liability have *been found to violate 31 U.S.C. § 1341. See Johns-Manville Corp. v. United States,* 12 Cl. Ct. 1 (1987); Assumption by Government of Contractor Liability to Third Persons, *62 Comp. Gen. 361 (1983) 83-1 CPD para. 501;* Reimbursement of the State of New York Under Support Contract, *B-202518, Jan. 8, 1982 (unpub.).* There are, however, statutory exceptions to this general rule. See, e.g., *10 U.S.C. § 2354* (research/development contracts may contain indemnity provisions for unusually hazardous risks); *50 U.S.C. § 1431*(President may exempt certain defense-related agreements from Antideficiency Act).

d. Court judgments or awards by boards of contract appeals may cause an agency to exceed an available appropriation or formal subdivision. Bureau of Land Management, *63 Comp. Gen. 308 (1984);* Availability of Funds For Payment of Intervenor Attorney Fees, *62 Comp. Gen. 693 (1983).*

B. Limitation on Voluntary Services. ***31 U.S.C. § 1342.***

1. An officer or employee may not accept voluntary services or employ personal services exceeding that authorized by law, except for emergencies involving the safety of human life or the protection of property. The Honorable Glenn English, House of Representatives, *B-223857, February 27, 1987 (unpub.).*

a. Voluntary services are services rendered without a prior contract for compensation or an advance agreement that services will be gratuitous. Army's Authority to Accept Services From the American Association of Retired Persons/National Retired Teachers Association, *B-204326, July 26, 1982 (unpub.).*

b. Acceptance of voluntary services does not create an obligation. Richard C. Hagan v. United States, *229 Ct. Cl. 423, 671 F.2d 1302 (1982);* T. Head & Co., Inc., B-238112, July 30, 1990 (unpub.); Nathaniel C. Elie, *65 Comp. Gen. 21 (1985).*

2. Examples of voluntary services authorized by law.

a. *10 U.S.C. § 2602* (President may accept assistance from Red Cross).

b. *5 U.S.C. § 3111* (student intern programs).

c. *10 U.S.C. § 4541* (Army Reserve officer services for training).

d. *10 U.S.C. § 1588* (military departments may accept voluntary services to assist museums, natural resources programs, or family support programs, etc.).

e. *33 U.S.C. § 569c* (Corps of Engineers may accept voluntary services on civil works projects).

3. Application of the emergency exception. This exception is limited to situations where immediate danger exists. Voluntary Services, *10 Comp. Gen. 248 (1930)* (exception not applied); Voluntary Services in Emergencies, *2 Comp. Gen. 799 (1923)* (exception applied). This exception does not include "ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property." *31 U.S.C. § 1342*.

C. Gratuitous Services Distinguished.

1. Acceptance of free services does not violate the

3. Caveat: The acceptance of gratuitous services may be an improper augmentation of an appropriation if the work to be performed would normally be performed by federal employees. Compare Community Work Experience Program, *B-211079.2, January 2, 1987 (unpub.)* (augmentation would occur), with Senior Community Service Employment Program, *B- 222248, March 13, 1987 (unpub.)* (augmentation would not occur).

D. Voluntary Creditor Rule.

1. A voluntary creditor is one who uses personal funds to pay what it perceives to be a valid obligation of the government.

2. As a general rule, recovery of such payments is barred.

a. Where a valid obligation of the government arises, specific procedures and mechanisms exist to ensure that the obligation is satisfied. To permit a volunteer to intervene in this process would interfere with the government's interest in seeing that its procedures are followed. Bank of Bethesda, *64 Comp. Gen. 467 (1985).*

b. Recoverability of claims. Lieutenant Colonel Tommy B. Tompkins, *B-236330, August 14, 1989 (unpub.);* Claim of Bradley G. Baxter, *B-232686, Dec. 7, 1988 (unpub.);* Irving M. Miller, B-210986, May 21, 1984 (unpub.); Grover L. Miller, *62 Comp. Gen. 419 (1983);* Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, *B-195002, May 27, 1980, 80-2 CPD para. 242.* Claims are recoverable if:

(1) The claimant shows a public necessity;

(2) The underlying expenditure is authorized;

(3) The claim is for goods or services; but see Reimbursement of Selective Service Employee for Payment of Fine, *70 Comp. Gen. 153 (1990);* and

(4) The expenditure is not for a personal use item.

E. Passenger Carrier Use. ***31 U.S.C. § 1344.***

1. An agency may expend funds for the maintenance, operation, and repair of a carrier only to the extent that such carrier is used for official purposes. Violations of this statute are not reportable as antideficiency violations, but significant sanctions do exist. See Felton v. Equal Employment Opportunity Commission, *820 F.2d 391 (Fed. Cir. 1987);* Campbell v. Department of Health and Human Services, *40 M.S.P.R. 525*

5. Overseas, military personnel and family members may utilize government transportation when public transportation is unsafe or unavailable. *10 U.S.C. § 2637.*

6. This statute does not govern the use of government vehicles (leased or owned) when government employees are in a temporary duty status. See Home-to-work Transportation for Ambassador Donald Rumsfeld, *B-210555.5, December 8, 1983 (unpub.).*

VII. SANCTIONS FOR VIOLATING THE ANTIDEFICIENCY ACT

A. Adverse Personnel Actions. *31 U.S.C. §§ 1349(a) and 1518.*

1. Officers or employees who authorize or make prohibited obligations or expenditures shall be subject to appropriate administrative discipline, including suspension without pay and removal from office.

2. Good faith or mistake of fact does not relieve an individual from responsibility for an antideficiency violation. Circumstances such as "a heavy workload at year end" or an employee's "past exemplary record" generally are relevant only in determining the appropriate level of discipline, not in determining whether discipline should be imposed. *DFAS 37-1.*

3. An officer or employee who willfully uses or authorizes the use of a government passenger carrier for unofficial purposes or otherwise violates *31 U.S.C. § 1344* shall be suspended without pay for at least one month. Violators may also be summarily removed from their jobs. *31 U.S.C. § 1349(b).*

B. Criminal Penalties. *31 U.S.C. §§ 1350, 1519.*

1. Knowing and willful violations may result in criminal prosecution.

2. If found guilty, punishment may include a $5,000 fine, two years imprisonment, or both.

VIII. REPORTING AND INVESTIGATING VIOLATIONS *31 U.S.C. §§ 1351, 1517; DFAS 37-1*

A. Flash Report. *DFAS 37-1*, requires a flash report within 15 working days of discovery of the violation. The report includes:

1. Administrative information;

2. A brief, but comprehensive, statement of facts as known; and

3. The anticipated date for submission of a formal report.

C. Establishing Responsibility.

1. Responsibility for a violation is fixed at the moment that the improper activity occurs (e.g., overobligation, overexpenditure, etc. *DFAS 37-1*).

2. A responsible party is the person who has authorized or created the overdistribution, obligation, commitment, or expenditure in question. Commanders, budget officers, or finance officers should not be named automatically merely because of their positions.

Any investigation should "lead to a specific determination of the <u>one act</u> that caused the violation, and the <u>one individual</u> who committed the act."

a. Generally, the responsible party will be the highest ranking official in the decision making process who had either actual or constructive knowledge of precisely what actions were taken <u>and</u> the impropriety or questionable nature of such actions. <u>Cf. To The Honorable Dennis P. McAuliffe</u>, *B-222048, Feb. 10, 1987 (unpub.).*

b. There will often be officials who had knowledge of one of the factors. The person in the best position to prevent the ultimate error, however, is the highest ranking official who was aware of both factors.

c. If an accounting error triggers a violation, the person who made the accounting error will be responsible, assuming no other official should have detected the mistake. *DoD Accounting Manual 7220.9-M, Chapter 21, para. E.4.c.*

d. Reports to the President and Congress.

1. The head of the agency must report to the President and Congress whenever a violation of *31 U.S.C. §§ 1341(a), 1342, or 1517 is discovered. OMB Cir. A-34, para. 32.2; DoD Dir. 7200.1, Encl. 5, para. R; DFAS 37-1.*

2. Contents of the report.

a. Administrative information;

b. Nature of the violation;

c. Identification of the responsible individual;

d. Cause and circumstances of the violation;

e. Administrative discipline imposed;

f. Actions taken to correct the violation;

g. Statement of the responsible individual.

B. Quasi-Contractual Recovery**. Even if a contract is deemed unenforceable or void, an implied-in-law contract may exist, and a contractor may receive compensation under the equitable theories of quantum meruit (for services) or quantum valebant (for goods). 31 U.S.C. § 3702;**
Prestex Inc. v. United States, *320 F.2d 367 (Ct. Cl. 1963);* Claim of Manchester Airport Authority for Reimbursement of Oil Spill Clean-up Expenses, *B-221604, March 16, 1987, 87-1 CPD para. 287;* Department of Labor, 62 Comp. Gen. 337 (1983), 83-1 CPD para. 430.

C. Ref **that cannot be paid out of existing appropriations to Congress. 31 U.S.C. § 3702(d); Campanella Construction Co., Inc., *B-194135, November 19, 1979, 79-2 CPD para. 361.***

Section E: Expired Appropriations

I. CONSTITUTIONAL FOUNDATION

A. U.S. Constitution, Article I, Section 8, Clause 1 **-** The Power to Tax and Spend.

B. U.S. Constitution, Article I, Section 8, Clause 16 - Organizing and training the militia.

C. U.S. Constitution, Article I, Section 9, Clause 7 - No Money Spent Except As a Consequence of a Lawful Appropriation**.**

II. STATUTORY FOUNDATION

A. ***31 U.S.C. §§ 1551-1557.***

B. ***31 U.S.C. § 1301.***

C. ***10 U.S.C. § 2782.***

III. REGULATORY FOUNDATION

A. Control and Financial Management of Expired Appropriations Accounts**, *1990, Hearings Before the Senate Committee on Governmental Affairs,* 101st Cong. 2nd Sess. (statement by Milton J. Socolar, Special Assistant to the Comptroller General, United States General Accounting Office, on August 2, 1990) (Hearing Socolar Testimony).**

B. Lapsed Accounts: Army, Navy and Air Force "M" and Merged Surplus Authority Account Balances**, *B-240041, May 22, 1990 (unpub.),* also referred to as GAO, Lapsed Accounts: Army, Navy and Air Force "M" and Merged Surplus Authority Account Balances, *GAO Rep. No. NSIAD-90-170*, available from the U.S. General Accounting Office (hereafter referred**

D. Overview.

1. The 1991 Department of Defense Authorization Act radically altered the manner in which funds are accounted for and used after the end of the period of availability.

2. While the former rules concerning the operation of surplus authority, merged surplus authority, and the "M" accounts have changed, an understanding of the law as it existed prior to the enactment of the 1991 Department of Defense Authorization Act is essential to understanding the new rules governing expired appropriations and the transition rules under which the existing surplus authority, merged surplus authority, and "M" accounts will be converted to the new system of management of expired appropriations.

IV. PRE-FISCAL YEAR 1991 RULES.

A. General.

1. A flow chart of the Pre-Fiscal Year 1991 procedures is contained in the 1990 GAO Study.

2. There were accounts into which obligational authority and undisbursed balances of appropriations were transferred after the period of availability expired. *1990 GAO Study*.

3. These accounts are the surplus authority account, the merged surplus authority account, expired appropriations, and the "M" account. 1990 GAO Study.

4. Congress created this structure of surplus authority, merged surplus authority, and "M" Accounts in 1956. Pub. L. No. 84-798; codified at *31 U.S.C. §§ 1551-1555.*

5. When Congress established these accounts, no one expected that these accounts would accumulate substantial balances. *1990 GAO Study at p. 1.*

a. Current balances are difficult to ascertain with precision because of bookkeeping problems associated with maintaining an audit trail over prolonged periods of time, without any fiscal year identifier for the funds. Socolar Testimony.

b. 1990 estimates of the DoD Merged Account balances total $43,893,344,000, broken out as follows:

(1) "M" Account - $18,498,882,000;

(2) Merged Surplus Authority Account - $25,394,462,000. 1990 GAO Study, at p. 3.

(2) Funds in the Surplus Authority Account retained their fiscal year identity for 2 years, after which time any remaining balances were transferred to an account known as the Merged Surplus Authority Account. Socolar Testimony.

b. Deobligated funds were treated as if they were unobligated funds and were transferred into surplus authority or merged surplus authority accounts. Lapsed Accounts: Army, Navy and Air Force "M" and Merged Surplus Authority Account Balances, B-238041, May 22, 1990 (unpub.); also referred to as: GAO Lapsed Accounts: Army, Navy and Air Force "M" and Merged Surplus Authority Account Balances, *GAO Rep. No. NSIAD-90-170.*

c. No-year appropriations also were withdrawn to the Treasury, if no disbursements had been made from the fund within a two year period.

d. Surplus Authority and Merged Surplus Authority accounts were available for restoration to an expired appropriation or an "M" Account to pay for upward adjustments in obligations. Socolar Testimony.

e. Funds in the Surplus Authority and the Merged Surplus Authority Accounts retained their general purpose identity, e.g., operation and maintenance, procurement, construction, but lost all other accounting classification identification. Socolar Testimony.

f. Obligated Balances - Expired Appropriations and "M" Accounts.

(1) The obligated balances that were not disbursed during the period of availability remained available for adjustment to prior obligations and disbursement or expenditure, but not for new obligation. These appropriations also retained their original fiscal year identity for two years after the expiration of the funds. These accounts were referred to as expired appropriations. AR 37-1, Glossary, Section II, Terms; *31 U.S.C. §§ 1551(a)(1), 1552(a)(1), 1553(a).*

(2) After two years, undisbursed obligated balances merged with similar balances from other fiscal years and were available indefinitely to liquidate obligations and to effect adjustments to prior obligations. These merged accounts were referred to as "M" Accounts. *31 U.S.C. §*

4. Congress perceived that these accounts were subject to potential and actual abuse of executive agencies. *1990 GAO Study*. In the National Defense Authorization Act for Fiscal Years 1990 and 1991, *Pub. L. No. 101-189*, Congress required the Secretary of Defense, or the service Secretaries, to approve restorations to the "M" Account for late contract changes in excess of $4 million in a fiscal year. *10 U.S.C. § 2782.*

V. FISCAL YEAR 1991 CHANGES TO EXPIRED APPROPRIATIONS

A. General.

1. The 1991 Defense Authorization Bill, *Public Law 101-510*, contained sweeping revisions in the treatment of expired funds and closed accounts. National Defense Authorization Act for Fiscal Year 1991, *Pub. L. No. 101-510, §§ 1405-1406, 104 Stat. 1676 (1990), codified at 31 U.S.C. §§ 1551 through 1557.*

2. The revised rules applied to all executive agencies.

3. The revised rules primarily applied to "fixed appropriations." A "fixed appropriation" is defined as an appropriation available for obligation for a definite period of time. The term encompasses annual appropriations and multiple year appropriations.

4. The revised rules required auditable identification of funds and final closure of accounts five years after the expiration of the period of availability.

B. Use of Expired Funds.

1. Some obligations and adjustments will be possible after the end of the period of availability, but before the closing of the account.

a. Appropriations retain their complete accounting classification identifiers throughout the entire five year period;

b. Appropriations remain available for recording, adjusting, and liquidating obligations properly chargeable to the account. *31 U.S.C. § 1553(a).*

2. On 30 September of the fifth (5th) year after the period of availability of a fixed appropriation ends:

a. The account is to be closed;

b. All remaining obligated and unobligated balances in the account are cancelled; and

c. No funds from the closed account are available thereafter for obligation or

6. If the period of availability for a fixed appropriation has ended, and if an obligation of funds from that appropriation is required to provide funds for a program, project, or activity to cover a contract change:

a. The head of the agency must approve all changes in excess of $4 million;

b. The head of the agency must submit a notification to Congress of intent to obligate funds together with legal and policy justifications in support of the proposed obligation, and wait 30 days before obligating the funds for all changes in excess of $25 million. *31 U.S.C. § 1553(c).*

7. For purposes of the notice requirements discussed in the preceding paragraphs, a contract change is defined as a change to a contract that requires the contractor to perform additional work. The definition specifically excludes adjustments necessary to pay claims or increases in contract price due to the operation of an escalation clause in the contract. *31 U.S.C. § 1553(c)(3).*

8. The DoD Comptroller has expanded the definition of a contract change to include any change that results in increases in contractor billable costs.

9. The heads of the defense agencies are required to submit annual reports on the impact of these revisions to the procedures for accounting for expired funds and closing accounts.

C. Transition Rules for Existing Closed Accounts**.**

1. The Authorization Act contained complex rules for the transition of existing unobligated and obligated, but unexpended funds in the "M" Account and in the surplus authority and the merged surplus authority accounts.

2. Transition Rules are Phased-In.

a. The new rules were phased-in between November 1990 and September 1993.

b. The operation of the new rules depended on the status of funds in a given account on the day prior to the enactment of the 1991 DoD Authorization Act. The Authorization Act was passed on 5 November 1990. Accordingly, the critical date for the transition period was 4 November 1990.

c. How funds are managed during the transition period is determined by whether the

4. Transition Rules Governing Obligated Balances.

a. On September 30, 1993, all obligated balances previously transferred under *31 U.S.C. § 1552(a)(1)* (Old Rules) were cancelled.

b. After enactment of the 1991 DoD Authorization Act, all balances previously transferred under *31 U.S.C. § 1552(a)(1)* (Old Rules) will be subject to the limitations and notice requirements of *31 U.S.C. § 1553(c) (New Rules).*

c. Thirty days after the submission of the FY 1992 Budget by the President to Congress, (which occurred on 4 February 1991) any obligated amount that had been transferred under *31 U.S.C. § 1552(a)(1)* (Old Rules) and which had been in that account (the "M" Account) for greater than five years was deobligated and withdrawn as provided by *31 U.S.C. § 1552(a)(2)* (Old Rules). The funds were cancelled as of 5 March 1991.

(1) Funds deobligated under this subsection may not be restored.

(2) Funds did not have to be deobligated if the amount obligated was to be paid out within 180 days of enactment, i.e., by 5 May 1991.

(3) Funds need not be deobligated if they are needed to pay severance pay to foreign national employees.

(4) This scrub of old funds in the "M Accounts" is repeated in 1992 and in 1993, until the "M Accounts" are cancelled on 30 September 1993.

5. No later than 31 December 1991, the Secretary of Defense was required to audit all accounts created under *31 U.S.C. § 1552(a)* and determine which amounts are valid and which are no longer valid in the accounts. Those amounts determined by the Secretary to be no longer valid shall be deobligated and cancelled.

6. After the cancellati funds required by the changes to the closed acco structure, obligations and o obligations that previously would have beer chargeable to the "M" Acco ged Surplus Authority Account, and which otherwise are not chargeable to current acco harged to current appropriatio he following limitations:

a. Charges shall be limited to the lesser of:

Section F: Obligation of Appropriations

I. CONSTITUTIONAL FOUNDATION

No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law; and a regular Statement and Account of the Receipts and Expenditures of all Public Money shall be published from time to time. ***U.S. Constitution, Article 1, Section 9, Clause 7.***

II. STATUTORY FOUNDATION ***31 U.S.C. § 1501***

An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of

1. A binding agreement between an agency and another person (including an agency) that is

a. in writing, in a way and form, and for a purpose authorized by law; and

b. executed before the end of the period of availability for obligation of the appropriation of funds used for specific goods to be delivered, real property to be bought or leased, or work or service to be provided.

III. REGULATORY FOUNDATION

A. DoD Manual 7220.9-M, chapters 24 and 25.

B. AR 37-1, chapters 8 and 9.

C. AFR 170-13 and 170-8.

D. NGR 37-108.

IV. COMMITMENT OF APPROPRIATIONS

A. Definition of Commitment

1. An administrative reservation of funds based upon firm procurement requests, orders, directives, and equivalent instruments ***(DoD Manual 7220.9-M, ch. 24, para. B(2)(a); DFAS 37-1, AFR 170-13, para. 3a).***

2. Must be signed by a person authorized to reserve funds ***(DoD Manual 7220.9-M, ch. 24, para. B(2)(A)).***

3. Shall be recorded in the accounting records and uncommitted/unobligated balances reduced (Id.).

B. General Rules

1. Required for all appropriations except merged accounts ***(DFAS 37-1).***

2. Commitments in excess of available funds may violate

c. Shows commitment of funds.

d. Worksheet to record technical requirements information.

e. Place to maintain obligation record.

4. Funds citations

a. Means of identifying funds for purpose of obligations.

b. Way that agencies keep track of funds.

c. Tells who is using money and what it's being used for.

D. Commitment Accounting

1. Amount of commitment *(DFAS 37-1).*

a. Based on procuring activity's estimate for goods, supplies, or services required to meet only bona fide needs of the period for which funds were appropriated.

b. Include estimated contingent liabilities.

c. Open-end contracts and option agreements must be recorded as a commitment only when the amount is reasonably firm.

2. When Recorded

a. Date commitment document signed determines the accounting period in which commitment is recorded.

b. Cancel outstanding commitments as of the end of the period that the appropriation is available *(AR 37-1, para. 8-4(a)(6); AFR 170-13, para. 5d).*

c. There can be no outstanding commitments in expired appropriation accounts.

V. OBLIGATION OF APPROPRIATIONS

A. Definition ***(DoD Manual 7220.9-M, ch. 24, para. B(d); DFAS 37-1; AFR 170-8, para. 2a).***

1. Any act that legally binds the U.S. Government to make a payment.

2. Must be supported by documentary evidence of the transaction *(DoD Manual 7220.9-M, ch. 25, para. C(2); AFR 170-9, para. 4a; NGR 37-108, para. 3-1b);* examples:

a. DD Form 1155 (Order for Supplies or Services).

b. SF 33 (Solicitation, Offer, and Award).

c. SF 30 (Amendment of Solicitation/Modification of Contract).

d. SF 1449 (Acquiring Commercial Items).

3. Exceptions to bona fide need rule

a. Lead Time

(1) Performance in a future fiscal year may be a bona fide need of the current fiscal year if the normal production lead time would require procurement action in the current fiscal year to insure timely delivery.

(2) Contracts must be entered into with the intent that performance will begin without unnecessary delay *(DoD Manual 7220.9-M, ch. 25, para. C(3)(b)).*

b. Statutory exception for maintenance and repair projects *(10 U.S.C. § 2410a; DoD Manual 7220.9-M, ch. 25, para. C(3)(c)).*

(1) Must satisfy a bona fide need arising in the fiscal year of the appropriation.

(2) May award contract near end of fiscal year for performance to begin next fiscal year.

(3) Must include requirement that work begin before January 1.

c. Replacement Contracts

(1) Where contract terminated for default, funds cited in defaulted contract may be used for the replacement contract *(DoD Manual 7220.9-M, ch. 25, para. C(3)(d)).*

(2) Replacement contract must be awarded without undue delay after termination.

(3) Bona fide need must continue to exist.

(4) Replacement contract must be awarded on the same basis and be substantially similar to the original contract in scope and size.

C. General Rules for Obligating Funds

1. Funds cannot be obligated in advance of appropriations and apportionment; a fund authorization document must be received prior to obligation.

2. If administrative lead time requires a contract to be awarded prior to receipt of funds to ensure timely delivery of goods and services, use "Subject to Availability of Funds" **clause.**

D. Determining Time and Amount of Obligation

1. General Rule: obligate full amount of the legal liability of the United States.

(4) to avoid possible Antideficiency Act violation, must commit funds in amount of ceiling price (Secretary of Defense, *34 Comp. Gen. 418, 420-21 (1955)).*

c. Cost reimbursement contracts (cost-plus-fixed-fee, award fee or incentive fee, time and materials contracts).

(1) obligate total estimated costs, including fixed, base or target fees.

(2) if ceiling price of contract is increased under the Limitation of Cost Clause, obligate additional funds to cover the new maximum liability of the government.

(3) the additional funds must come from funds current at the time of the adjustment (Environmental Protection Agency, 61 Comp. Gen. 609, 612 (1982)).

(4) when evidence indicates that costs will be less than originally estimated, must recover the excess funds; these excess funds may not be used in a succeeding fiscal year (Magnavox, *B-207433, September 16, 1983*)).

d. Indefinite delivery-definite quantity contracts obligate full amount of the definite quantity at time of award.

e. Indefinite delivery-indefinite quantity contracts.

(1) obligate the stated minimum quantity at the time of award.

(2) obligate additional funds for each additional order at the time the order is issued.

f. Requirements contracts obligate the amount of each delivery order on date issued.

g. Letter contracts.

(1) used only when no other contractual arrangement is possible to cover payments for work which must be commenced immediately, but prior to all the details having been agreed upon by the parties; the parties contemplate reaching agreement a matters which will later be recorded in the definitize agreement which tter contract.

(2) agencies i tatement of the Government's maximum assure that the contractor does not incur costs in excess of

h. Purchase orders.

(1) obligate amount of purchase order.

(2) if unilateral (acceptance is evidenced by performance), obligate funds upon notice of acceptance or delivery.

(3) if bilateral, obligate on date of execution.

i. Rental agreements and leases of real or personal property.

(1) obligate one month at a time throughout the term of the rental agreement.

(2) amount of obligation.

(a) if government may terminate without notice and without termination costs, obligate one month's rent each month.

(b) if the government may terminate without cost upon giving a specified number of days notice, obligate one month's rent plus the amount of rent for the number of days notice.

(c) if the government may terminate with a specified payment in the event of termination, obligate one month's rent plus the amount of the termination payment.

(d) if there is no termination provision, obligate the full amount of the rental agreement, up to 12 months, even if the agreement extends into the next fiscal year.

j. Intra-government agreements.

(1) Reimbursable procurement - if procurement ordered from another DoD agency or GSA where other DoD agency or GSA is to be reimbursed, obligate funds at time other DoD agency or GSA accepts the order in writing.

(2) Direct citation - if procurement to be done by other DoD agency via contract showing separate prices and quantities with cites to ARNG funds, obligate funds at time of notification of award of the contract.

(3) Orders required by law to be placed with another U.S. Government agency (Federal Prison Industries, Government Printing Office) - obligate funds at the time order is issued.

(4) Project Order Law *(41 U.S.C. § 23)*

k. Stock Fund Orders

(1) Obligation recorded when order placed; if the item does not have a stock number, the obligation is recorded when the stock fund accepts the order *(DoD 7220.9-M, ch. 25, para. G(1)(b)).*

(2) Obligation cancelled when notified of unacceptable substitution, transfer of item to centrally-managed procurement appropriation, or stock fund's inability to perform *(DoD 7220.9-M, ch. 25, para. G(2)(a)).*

(3) Obligation for non-stock-numbered item expires if appropriation expires before stock fund has executed a procurement action *(Id., at para. G(3)).*

3. Bona Fide Need Rule and Service Contracts

a. Funds may only be used for a bona fide need for the period during which funds are available.

b. Funds certifying officer can be held liable for certifying wrong funds.

c. Severable contracts.

(1) Severable services are continuing and recurring services, a specific portion of which are needed in a subsequent FY (Proper Fiscal Year Appropriation to Charge for Contract and Contract Increases, *65 Comp. Gen. 741, 743 (1986)).*

(2) Obligate funds current when contract signed for the amount necessary to fund the contract to the end of the period of availability of the funds (Obligations and Charges Under Small Business Administration Service Contract, *60 Comp. Gen. 219, 221-22 (1981)).*

(3) Exceptions - *10 U.S.C. § 2410a* provides that funds shall be available for payments under contracts for severable services for 12 months beginning at anytime during the fiscal year:

d. Nonseverable service contracts.

(1) Non-severable services are single undertakings with one identifiable end product; test is whether services will meet immediate need.

(2) Obligate funds current when contract signed for the full amount of the contract.

E. Adjustment of Obligations

1. Obligations must be adjusted when changes in circumstances

(2) Adjust obligation to reflect increase or decrease.

(3) Additional funds from fiscal year cited in original contract *(DoD 7220.9-M, ch. 25, para. 11(a)).*

b. Cost-reimbursement contract changes.

(1) Where change does not require increase in ceiling price, use funds from fiscal year cited in original contract (61 Comp. Gen. at 611).

(2) Where change requires increase in ceiling price, obligate funds to cover the cost of change from funds available when change approved by contracting officer (Id., at 612).

c. Correction of mistakes and formalization of informal agreements *(DoD 7220.9-M, ch. 25, para. 11(b)).*

(1) Adjust obligation to reflect correct amount.

(2) Use funds from fiscal year cited in original contract.

(3) If adjustments result of change in scope of contract or are a new procurement, use funds current at time of adjustment.

d. Contingent liabilities - indemnification clause or equitable adjustment clause.

(1) Use funds from fiscal year cited in original contract.

e. On changes beyond the scope of original contract - such as increase in quantity, use funds from fiscal year current at time change is directed.

f. Claims *(AR 37-1, Table 9-9).*

(1) If within the scope of contract, use funds from fiscal year cited in original contract.

(2) If outside scope of contract, use funds from fiscal year current when change giving rise to the claim occurred.

g Incrementally funded contracts - use funds current when contract enters into each new fiscal year.

F. Terminated Contracts

1. Termination for Convenience.

a. Recover all funds in excess of the estimated termination settlement costs *(DoD Manual 7220.9-M, ch. 25, para. 12; AR 37-1, Table 9-9).*

2. Termination for Default.

a. Funds obligated under original contract remain available for a reprocurement contract even if their period of availability has expired, but only if:

(1) The replacement contract is awarded without undue delay;

(2) There is still a bona fide need for the goods or services;

(3) The replacement contract is awarded on the same basis as the original contract, except for the total cost;

(4) The replacement contract is substantially similar to the defaulted contract in nature, size, and scope. *(Funding of Replacement Contracts, 60 Comp. Gen. 591, 592-93 (1981)).*

b. Excess costs must be funded by current appropriations.

c. Funds recovered from the defaulted contractor as excess reprocurement costs are returned to the account of the original contract for use in the reprocurement (Army Corps of Engineers, 65 Comp. Gen. 838, 841-42 (1986); Bureau of Prisons, *62 Comp. Gen. 678, 682 (1983)).*

3. Termination for default converted to termination for convenience.

a. If replacement contract already awarded using the original contract's funds, no corrective action required (Id., 60 Comp. Gen. at 594).

b. If conversion is on appeal and replacement contract has not already been awarded using original contract's funds, the original contract's funds are no longer available for obligation; must use current FY funds for replacement contract (Id.).

G. Contract Litigation

1. Settlements - use funds from fiscal year originally cited in the contract.

2. Judgments - paid from judgment fund *(31 U.S.C. § 1304).*

a. Agencies reimburse from funds available at the time of entry of judgment (Bureau of Land Management, *63 Comp. Gen. 308 (1984)).*

3. Costs of litigation - costs, such as deposition transcripts and expert witness fees, are paid from funds available at the time the service or supply is needed.

J. Service Contracts Extended Beyond End of Fiscal Year

1. Rules for use of option contracts.

a. Exercise of option cannot be automatic.

b. Need determination that the option is the most advantageous means of filling the requirement.

c. Contract must have a subject to availability of funds clause *(FAR 52.232-18).*

d. Obligate funds for each option period after funds become available.

2. Requirements or indefinite quantity contracts.

a. Must have subject to availability of funds clause *(FAR 52.232-19).*

b. For each order use current year funds.

Section G: Intragovernmental Acquisitions

I. CONSTITUTIONAL FOUNDATION

A. U.S. CONSTITUTION - ***ARTICLE I, SECTION 9, CLAUSE 7***

No money shall be drawn from the Treasury, but in consequence of appropriations made by law.

B. U.S. CONSTITUTION - ***ARTICLE II, SECTION 3***

[The President] shall take care that the Laws be faithfully executed.

II. STATUTORY FOUNDATION

A. ECONOMY ACT - ***31 U.S.C. 1535***

The head of an agency or major organizational unit within an agency may order goods or services from another major organizational unit within an agency or another agency.

B. Annual Authorization Appropriations Acts, e.g. National Defense Authorization Act for FY94, ***Public L.aw No. 103- 160.***

III. REGULATORY FOUNDATION

A. FEDERAL ACQUISITION REGULATION - ***SUBPART 17.5***

B. ***DFARS 217.5***

C. ***AR 37-21***

B. REQUESTING AGENCY

C. SERVICING AGENCY

V. ECONOMY ACT -

Agencies may order goods or services from organizational units within the same agency or another agency if:

A. Amounts Are Available;

B. Head of Agency or Unit Decides Order Is in the Best Interest of the U.S.;

C. Agency Filling the Order Is Able to Provide or Get by Contract the Goods or Services; **and**

D. Goods or Services Cannot Be Provided As Conveniently or Cheaply by Commercial Enterprise.

1. DoD now requires goods or services to be provided as convenient and as cheaply.

VI. PROCEDURES

A. PAYMENT

1. Made promptly by check on written request of servicing agency.

2. *FAR 17.505* - May be made in advance or on providing of goods or services. This is an exception to usual limitation on advance payments.

3. May be for all or any part of the estimated or actual cost as determined by the servicing agency.

4. Request for payment is not subject to audit or certification in advance of payment.

B. CONDITIONS OR LIMITATIONS

A condition or limitation applicable to the requesting agency is applicable to the servicing agency.

1. Authorization and Appropriation Acts.

2. Delegations of Procurement Authority.

3. Serving agency must already be buying by contract, have unique capabilities or expertise, or be specifically authorized by law to purchase.

Section H/I - Not Applicable

Section J: Continuing Resolutions

II. STATUTORY FOUNDATION

A. The Antideficiency Act

1. *31 U.S.C. § 1341*. Prohibition on obligations or expenditures in excess of appropriations and contracting in advance of appropriation.

2. *31 U.S.C. § 1342*. Prohibition on government employees accepting voluntary services.

III. REGULATORY FOUNDATION - *DFAS 37-1*

IV. DEFINITIONS

A. CONTINUING RESOLUTIONS

1. "Legislation enacted by Congress to provide budget authority for Federal agencies and/or specific activities to continue in operation until the regular appropriations are enacted. Continuing resolutions are enacted when action on appropriations is not completed by ...."

2. "An interim appropriation until permanent appropriations are enacted. Authorizes continuation of normal operations at a rate not to exceed the latest congressional action or the previous year's rate and no new starts or expansions to a program." Army Regulation *(AR) 37-1*, Glossary, Section II, Terms.

B. FUNDING GAPS

1. A legal and budgetary limbo during which Federal agencies have no authority to incur obligations or to make payments. U.S. General Accounting Office, *Funding Gaps Jeopardize Federal Government Operations, PAD-81-31, March 3, 1981.*

2. It occurs when there is no appropriation for a program because Congress has not enacted one or the President has vetoed it. CETA Appropriation Under 1979 Continuing Resolution, *58 Comp. Gen. 530, 532 (1979).*

V. GOVERNMENT OPERATIONS WITHOUT A CONTINUING RESOLUTION

A. POTENTIAL ANTIDEFICIENCY ACT VIOLATIONS

1. The Comptroller General opined that permitting agency employees to work during any period for which Congress has not enacted an appropriation for the pay of these employees violates the Antideficiency Act, *31 U.S.C. § 1341*. Representative Gladys Noon Spellman, *B-197841, March 3, 1980 (unpub.).*

2. The Attorney General opined that during periods without

B. PERMISSIBLE ACTIVITIES

1. In the event of a funding gap, agencies may continue:

a. Activities otherwise authorized by law. *31 U.S.C. § 1342, 41 U.S.C. § 11,*

b. Activities that protect life and property, and

c. Activities necessary to begin a phasedown of other activities.

2. Congress limited the range of activities permissible during a funding gap in a 1990 amendment to the Antideficiency Act. Excluded are "ongoing, regular functions of the government the suspension of which would not immediately threaten safety of human life or protection of property." *Pub. L. No. 101-508, Sec. 13213(b); 104 Stat. 1388-621 (1990).*

3. Examples of permissible activities:

a. National security, including conduct of foreign relations essential to national security or safety of life and property.

b. Payments and performance of contract obligations under no-year and multi-year authority, or expenditures from other funds still available for those purposes.

c. Essential protection of life and property.

(1) Medical care of inpatients and emergency outpatient care.

(2) Activities essential to ensuring public health and safety, including safe use of food, drugs, and hazardous materials.

(3) Border and coastal protection and surveillance.

(4) Protection of Federal lands, buildings, waterways, equipment, and other Government property.

(5) Care of prisoners and other persons in U.S. custody.

(6) Law enforcement and criminal investigations.

(7) Emergency and disaster assistance.

(8) Activities essential to preservation of essential elements of money and banking system, including borrowing and tax collection activities of the Treasury.

(9) Activities that ensure production of power and maintenance of power distribution

b. Army disbursements during a funding gap. AR 37-1, para. 13-6(b).

(1) Emergencies involving death or personal hardship.

(2) Initial health and comfort needs of the active Army, Army National Guard, and Army Reserve.

(3) Mission-essential travel.

(4) PCS travel entitlement.

(5) Recruitment, retention, and transition of military personnel expenses, including bonuses for reenlistment.

(6) Revolving fund operations, with certain restrictions.

c. Military and civilian payrolls for work performed during a funding gap are not covered by *AR 37-1, para. 13-6(d).*

d. Specific instructions concerning personnel payrolls will be issued as needed. All personnel will report for duty, absent instructions to the contrary. *AR 37-1, para. 13-6(d).*

5. Administrative problems.

a. Lack of information.

b. Efficient operation of government is clearly compromised. U.S. General Accounting Office, Government Shutdown: Permanent Funding Lapse Legislation Needed, *GDD-91-76, June 6, 1991;* U.S. General Accounting Office, Funding Gaps Jeopardize Federal Government Operations, *PAD-81-31, March 3, 1981.*

VI. GOVERNMENT OPERATIONS WITH A CONTINUING RESOLUTION

A. RELATIONSHIP OF CONTINUING RESOLUTION TO APPROPRIATIONS ACT.

1. When signed into law by the President, a Continuing Resolution has the same force and effect as an appropriations act and its provisions are mandatory on Federal officials. Oklahoma v. Weinberger, *360 F. Supp. 724 (W.D. Okla. 1973), AR 37-1, para. 13-6.*

2. Both a Continuing Resolution and an appropriations act provide budget authority.

3. Appropriations usually provide specific sums of money. Continuing Resolutions usually provide "such amounts as may be necessary" for continuing projects or activities at a specified "rate for operations."

2. An agency follows its historic pattern of obligations.

a. A Continuing Resolution usually is enacted to cover a limited period of time.

b. A Continuing Resolution technically appropriates the full annual amount.

3. OMB apportions funds appropriated by a Continuing Resolution as well as by regular appropriations acts. ***31 U.S.C. § 1512, AR 37-1, para. 6-9(b).***

4. A Continuing Resolution is interpreted as appropriating sufficient funds to liquidate due debts based on validly executed contracts from previous fiscal years.

5. Obligations incurred under a Continuing Resolution were still valid even though they subsequently exceeded the final appropriation from Congress. **Treasury Withdrawal of Appropriation Warrants for Programs Operating Under Continuing Resolution,** ***62 Comp. Gen. 9 (1982),*** **Staff Sergeant Frank D. Carr, USMC--Transferred Service Member--Dislocation Allowance,** ***67 Comp. Gen. 474 (1988).***

C. PROJECTS OR ACTIVITIES

1. Refers to total appropriations when determining either which programs are covered by the Continuing Resolution or the rate for operations.

2. Refers to a specific activity when determining whether an activity was authorized or carried out in a previous Fiscal Year. **Chairman, National Advisory Council on Extension and Continuing Education,** ***52 Comp. Gen. 270 (1972),*** **Special Defense Acquisition Fund,** ***66 Comp. Gen. 484 (1987).***

D. DURATION

1. Enactment of the regular appropriations bill.

2. Fixed cut-off date.

3. Entire Fiscal Year.

E. RELATIONSHIP OF CONTINUING RESOLUTION TO OTHER LEGISLATION

1. A Continuing Resolution often appropriates funds to continue projects "not otherwise provided for."

2. When bills or budget estimates are referenced, their status on the date the Continuing Resolution becomes law is controlling.

3. The term "more restrictive authority," means the version of the bill appropriating less

Section K: Payment and Collections

I. CONSTITUTIONAL FOUNDATION

A. U.S. Constitution, Article I, Section 9, Clause 7.

II. STATUTORY FOUNDATION

A. *10 U.S.C. § 2307* - Advance Payments.

B. *31 U.S.C. § 3727* - Assignment of Claims Act.

C. *31 U.S.C. § 3901* - Prompt Payment Act.

D. *31 U.S.C. § 3302* - Miscellaneous Receipts.

E. *31 U.S.C. § 3711* - Federal Claims Collection Act.

F. *31 U.S.C. § 3701* - Debt Collection Act.

G. *41 U.S.C. § 255* - Advance Payments.

III. REGULATORY FOUNDATION

A. *FAR Part 32.*

IV. TYPES OF CONTRACT PAYMENTS

A. Advance Payments - *10 U.S.C. 2307, 41 U.S.C. 255.*

1. May be used on any type of contract, but should be authorized sparingly, and only if other methods of contract financing are not reasonably available to the contractor.

2. Statutory Limitations on Use

a. Contractor must give adequate security.

b. Amount may not exceed the unpaid contract price.

c. Must be a written determination by the agency head or designee that advance payment is in the public interest, or it facilitates the national defense.

3. Standards for Use - *FAR 32.4*

a. Will not exceed interim cash needs.

b. Necessary to supplement other funds.

c. Responsible contractor.

d. Government benefit from performance.

e. Compliance with *FAR 32.403.*

(1) R&D with educational institution

(2) M&O of Government Plant

(3) Acquisition of Government facility

(4) Classified contract

(5) Financially weak contractor

(6) Loans not available or rates unreasonable

4. Advance Payments not Subject to FAR Limitations.

a. Rent.

b. Tuition.

c. Insurance Premiums.

d. Expenses of investigations in foreign countries.

e. Connection charges for public utilities for Government buildings or installations.

f. Subscriptions to publications.

g. Certain small purchases for services or supplies in foreign countries.

h. Enforcement of customs or narcotics laws.

i. Other transactions excluded by the agency under statutory authority.

(1) Advertising for military recruitment in high school and college publications not to exceed $500 under any one contract.

B. Progress Payments - Payment made even though nothing delivered

1. Customary rate - 80 percent (85 percent for small business concerns).

2. Unusual terms - Any progress payment with rate higher than customary rate.

3. Suspension or reduction of payments.

a. Contractor has inadequate system to track payments.

b. Contractor was received overpayments.

c. Contractor performance is unsatisfactory.

d. Contractor having financial difficulties.

4. Progress Payments are generally not used on contracts less than $1 Million.

5. Exceptions

a. Several contracts aggregating more than $1 Million.

b. Small and small disadvantaged business

c. Other extraordinary circumstances.

C. Partial Payments - Payment made as goods or services are delivered**.**

D. Progress Payment Construction Contracts - Based on percentage completion

1. Retainage

a. Use retainage only if Contractor is not making satisfactory

V. BONDS AND SURETIES

A. Performance Bonds and Bid Guarantees

1. Benefit Government by ensuring completion of contract performance.

2. Sureties liable to Government if contractor defaults.

a. Surety may complete performance itself or pay Government.

b. Sureties that complete performance entitled to unpaid contract proceeds.

c. Contractor liable for excess reprocurement costs if defaulted, or liquidated damages if late.

B. Payment Bonds

Benefit laborers, subcontractors, and suppliers if contractor fails to pay them.

VI. ASSIGNMENT OF CLAIMS

A. Directs payment to someone other than contractor.

B. Conditions for Use

1. Contract payments aggregate $1,000 or more.

2. Assignment made to bank, trust company, or other financing institution.

3. Contract does not prohibit assignment.

4. Assignment covers all unpaid amounts, is made to only one party, and is not subject to further assignment.

5. Copies of assignment are provided to appropriate offices.

C. Government may be liable for erroneous payments.

D. Requirements for Valid Assignment.

1. Corporation

a. Executed by authorized representative.

b. Attested by Secretary or Assistant Secretary, not Treasurer.

c. Impressed with eal, or accompanied by a certified copy of the resolution of the Board of rizing the signing representative to execute the assignment.

2. Partnership

VII. PROMPT PAYMENT

A. General Rule

The due date for payment of invoices is the 30th day after the designated payment office has received a proper invoice from the contractor, or the 30th day after acceptance of supplies or services, whichever is later.

B. Exceptions

1. Seven days for meat.

2. Ten days for other food products.

3. Fourteen days for construction.

C. For Purposes of Computing an Interest Penalty Only,

Acceptance is deemed to have occurred 7 days after the delivery of supplies or services unless there is a disagreement over quantity, quality, or compliance with a contract requirement.

D. Interest is payable at the Treasury rate which is adjusted every six months.

1. If a late payment is made, interest is to be paid automatically.

2. If contractor must request the interest payment, an additional penalty must be paid.

E. Discounts for Prompt Payment may be taken.

If the Government improperly takes a discount it is subject to an additional penalty.

F. Proper Invoice must include**:**

1. Name and address of contractor;

2. Date of the invoice;

3. Contract number;

4. Description, number of units, unit measure, unit price, and extended price;

5. Shipping and payments terms;

6. Where payment should be sent;

7. Who to notify in the event of a problem;

8. Other information requ[illegible] by the contract.

G. Requesting Opinion From the [illegible]ptroller General Does Not Stop Interest From Accruing**.**

H. Prompt Payment Act Interest Stops Accruing After One Year**.**

I. Interest may start accruing under Contract Disputes Act if

VIII. COLLECTION

A. Demand Letter - Send on Debts Over $1.

1. **Include description of debt.**
2. **Demand payment within thirty days.**
3. **Interest will begin to accrue if payment not made in thirty days.**
4. **Identification of individual to contact concerning debt.**
5. **Include offer to negotiate.**

   a. **If a contract debt, contracting officer must have issued a final decision under *FAR 33.2.***

   b. **Inconsistency with *FAR 33.2.* How final is a final decision if the demand letter offers to negotiate?**

   c. **Limit offer to negotiate to repayment terms.**

6. **Contractor may appeal.**

B. Right to Set-off Against Other Contracts

1. **Requires prior approval from *DFAS-IN***
2. **Contracts may prohibit set-off.**

C. Contract Withholding Against Current Contract.

Funds may be reused if they haven't expired.

D. Direct Payment

1. **Miscellaneous receipts statute**
2. **Funds may not be reused unless reappropriated by Congress.**

E. Interest

F. Statute of Limitations Is Six Years.

G. Write-off Per - ***FAR 32.616***

1. **Debts under $100,000 may be written off if:**

   a. **Further collection not practical;**

   b. **Cost of collection would exceed amount of recovery.**

H. Termination of Collection Action

1. **Inability to collect any substantial amount.**
2. **Inability to locate debtor.**
3. **Cost of collection would exceed amount of recovery.**
4. **Government's claim is legally without merit.**

I. Compromise or Settlement

1. Agency may compromise or settle debts up to $100,000.

2. Debts over $100,000 must be referred to Department of Justice.

3. Debts cannot be compromised or settled if any indication of fraud.

IX. CONCLUSION

A. General Rule

The due date for payment of invoices is the 30th day after the designated office has received a proper invoice from the contractor, or the 30th day after acceptance of supplies or services, which ever is later.

B. For Purposes of Computing an Interest Penalty Only**,**

acceptance is deemed to have occurred 7 days after the delivery of supplies or services unless there is a disagreement over quantity, quality, or compliance with a contract requirement.

Example 1.

Contractor A delivers supplies on March 1. Contractor A is able to issue an invoice on the spot via a hand held computer. Acceptance is deemed to have occurred on March 8. Payment is due 30 days after March 8 because deemed acceptance is later than the receipt of the invoice.

Example 2.

Contractor B delivers supplies on March 1. Contractor B is able to issue an invoice on the spot via a hand held computer. Acceptance is deemed to have occurred on March 8. Payment is due 30 days after March 8 because deemed acceptance is later than the receipt of the invoice.

Awards in HOST NATION CURRENCY
Now Awarding Contracts in Euros
FAR 25.501(a) requires offshore contracts with local firms be paid in Local Currency.
Use of U. S. currency requires special authorization under The
Host Nation.

FIGURE 8

Section L - Not Applicable

Section M: Personal Liability

I. CONSTITUTIONAL AUTHORITY

". . . No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time. *Article 1, Section 9*

II. STATUTORY AUTHORITY

A. ***31 U.S.C. § 3325*** Vouchers

B. ***31 U.S.C. § 3526*** Settlement of Accounts

C. ***31 U.S.C. § 3527*** General Authority Relieves Accountable Officials & Agents From Liability

D. ***31 U.S.C. § 3528*** Responsibility and Relief From Liability of Certifying Officials

E. ***31 U.S.C. § 3529*** Requests for Decisions of the Comptroller General

F. ***31 U.S.C. § 3342*** Check Cashing and Exchange Transactions

G. ***5 U.S.C. § 5514*** Installment Deductions for Indebtedness Due to Erroneous Payment

H. ***28 U.S.C. § 1496*** Disbursing Officers' Claims

I. ***28 U.S.C. § 2512*** Disbursing Officers: Relief

III. REGULATORY AUTHORITY

AR 37-103

IV. DEFINITION OF ACCOUNTABLE OFFICER

A. Any government officer or employee who, by reason of the person's employment, is

1. Responsible for, or

2. has custody of, government funds.

B. Any government officer or employee who physically handles government funds, even if only once or occasionally, is accountable for those funds while in the officer's or employee's possession.

V. TYPES OF ACCOUNTABLE OFFICERS

A. Certifying Officer

1. A person who certifies that payment vouchers are correct and ready for payment.

2. The officer doesn't have physical possession of the funds.

c. the correctness of the computations on the certified voucher, and

d. making good to the U.S. the amount of any illegal, improper or incorrect payment resulting from:

(1) any false, inaccurate or misleading certification made by the officer

(2) any payment prohibited by law or which did not represent a legal obligation under the appropriation or fund involved.

B. Disbursing Officer

1. A person who disburses funds and renders accounts in accordance with laws and regulations governing disbursement of public funds. *See 31 U.S.C. § 3325; AR 37-103.*

2. The officer has physical possession or control of the funds.

3. A disbursing officer is responsible for

a. disbursing funds only upon, and in accordance with, duly certified vouchers,

b. examining vouchers as necessary to ensure that they are in the proper form, are duly certified and approved, and

c. correctly computed on the basis of the facts certified.

C. Cashier

A person who is appointed to perform limited cash disbursing functions or other cash-handling operations to assist a finance officer. *See AR 37-103.*

D. Collecting Officer

A person who is authorized to receive or collect money for the government.

VI. LIABILITY OF ACCOUNTABLE OFFICERS

A. Strict Liability - the Accountable Officer Is an Insurer of the Funds.

B. An Accountable Officer Is Automatically Liable When the Loss Occurs.

1. A certifying officer is not liable unless an improper payment has been made on the basis of the certified voucher. Liability arises automatically at the moment of the improper payment.

2. A disbursing officer, cashier, or other officer who has physical possession or control of government funds is automatically liable when the physical loss occurs or erroneous payment is made.

C. There May Be More Than One Accountable Officer

D. An Accountable Officer Is Only Accountable for Funds in the Possession of the Government.

1. Interest and penalty charges on amounts owed to the U.S. are not in its possession, so the officer is not liable for them. Matter of: Liability of Accountable Officer for Lost Interest, *64 Comp. Gen. 303 (1985).*

2. A time discount lost through failure to submit the voucher within the stated time is not within the possession of the Government. The officer is not liable for the loss.

3. An officer is liable for submitting a voucher for the full amount during the period in which a time discount is available, because the voucher is inaccurate.

E. Check Cashing

1. GAO determined that military departments have authority to grant relief to an accountable officer in cases involving check cashing under *31 U.S.C. § 3342.* The statute does not require a finding of due care or lack of fault prior to granting relief. *10 U.S.C. § 2781 (2)* gives authority to use appropriations to adjust accounts of disbursing officers. *70 Comp. Gen. 616 (1991).*

2. If the agency declines to adjust the officer's account, the case will be sent to the GAO for relief under *31 U.S.C. § 3527(c)* as an erroneous payment, not a physical loss.

a. Under *31 U.S.C. § 3527(c),* the Comptroller General may grant relief for an illegal, improper, or incorrect payment if the payment was not the result of bad faith or lack of reasonable care by the disbursing officer. Relief may be denied if the head of the agency did not carry out diligent collection efforts.

b. Under *31 U.S.C. § 3527(b),* the Comptroller General may grant relief for the physical loss or deficiency of funds if the Secretary of Defense or the appropriate Service Secretary finds that the officer was carrying out official duties when the funds were lost, and the loss was neither the result of an incorrect or illegal payment nor the result of fault or negligence on the part of the official. The finding of the Secretary is binding on the Comptroller General.

VII. STANDARD OF CARE REQUIRED OF ACCOUNTABLE OFFICERS

A. Due Care

1. An accountable officer must exercise the highest degree of

2. Regulations dictate the accountable officer's actions in most instances. Failure to follow the regulations will result in a finding of negligence and a denial of relief if the negligence caused the loss. *49 Comp. Gen. 38 (1969).*

3. If there are no regulations governing the specific actions of the accountable officer, the Comptroller General will apply a reasonable person standard. That is, did the accountable officer do what a reasonably prudent and careful person would have done to take care of the person's own funds or property of like description under like circumstances? *54 Comp. Gen. 112 (1974).*

4. Mere agency determination that an accountable officer is faultless is insufficient. There must be sufficient evidence included in the request for relief for the Comptroller General to independently make the same determination as the agency.

C. Standard of Care Required of a Supervisor:

1. the supervisor must maintain a system of controls to prevent losses and erroneous payments, and

2. take steps to ensure that controls are implemented.

3. The supervisor must substantiate these facts.

4. The errors of a subordinate are not the errors of the supervisor if controls are in place to prevent mistakes. However,

5. entrusting funds to an inexperienced or incapable employee may make the supervisor equally liable for the loss. *70 Comp. Gen. 389 (1991).*

D. A Disbursing Officer Is Entitled to Rely on Information From a Certifying Officer

1. which the disbursing officer has no way of knowing is incorrect,

2. unless the disbursing officer has reasonable doubts as to the correctness of the facts on or attached to the voucher.

E. An Accountable Officer Must Make Adequate Efforts to Collect Any Erroneous Payments**.**

Within three months, the debt must be sent to the collection department or the Comptroller General may deny relief. Authority to deny relief based on lack of adequate collection efforts is discretionary, not mandatory. *62 Comp. Gen. 91 (1982).*

1. The Comptroller General will look to the collection

2. A certifying or disbursing officer, or the head of an agency, may request an opinion concerning the propriety of a certification or disbursement.

a. Army officials should attempt to resolve questions about payments through their local contracting officer or local Judge Advocate office. *AR 31-1, p. 20-19.*

b. If doubts remain and the amount is in excess of $100, request a decision from the Comptroller General.

c. If the amount is less than $100, request advice from *DFAS-IN* legal office. If doubts remain, seek advice from the Comptroller General.

3. The Comptroller General found that an accountable officer faced with questionable vouchers did not exercise reasonable care by relying on officials in the agency instead of applying to the Comptroller General for an advance decision. *65 Comp. Gen. 858 (1986); 49 Comp. Gen. 38 (1969).*

B. The Liability of Accountable Officers Is Statutory. **Agencies cannot shield officers from liability through devices such as Memoranda of Understanding. Matter of: Improper Payments Resulting from the Use of an Automated Address-Correction System, *69 Comp. Gen. 85(1989).***

IX. OBTAINING RELIEF FROM LIABILITY

A. Comptroller General

1. *31 U.S.C. § 3528*, Responsibilities and Relief from Liability of Certifying Officials, does not apply to disbursements of military departments, except for departmental pay and allowances in the District of Columbia. However, the Army adopted the statutory standard for its certifying officers.

a. Relief may be granted if either of the following conditions is met:

(1) an improper certification was based on official records and

(2) the officer did not know or could not by reasonable diligence and inquiry have discovered that the information was incorrect, or

(3) the obligation was incurred in good faith, (the officer had no reason to doubt his authority to make the certification), *B-241879, April 26, 1991,*

(4) payment was not prohibited by law,

2. Relief for disbursing officers is governed by *31 U.S.C. § 3527.* The statute distinguishes between physical losses *(31 U.S.C. § 3527(B))* and erroneous payments *(31 U.S.C. § 3527(C)).* The distinction is important because it determines which agency may grant relief. Military departments may grant relief for physical losses, but only the Comptroller General may grant relief for erroneous payments. *70 Comp. Gen. 616 (1991).*

a. The authority of military departments to treat deficiencies as physical losses is limited: it includes loss by theft, burglary, or in shipment; loss by fire, accident, or natural disaster; a shortage or deficiency with absolutely no evidence to explain the discrepancy; and loss resulting from fraud or embezzlement by subordinate finance personnel.

b. Erroneous payments result from the disbursement of public funds. Losses from cashing checks, whether from fraud or insufficient funds, are disbursements, and are therefore treated as erroneous payments.

3. *31 U.S.C. § 3527(B)(1)* governs relief for a disbursing officer of the Armed Forces for physical loss or deficiency of public money.

a. The request for relief must be from the appropriate agency official, such as the Secretary of Defense or the Secretary of the appropriate military department, and the agency head must determine that

(1) the officer was carrying out official duties when the loss or deficiency occurred,

(2) the loss or deficiency was not the result of fault or negligence by the officer.

(3) the finding of the Secretary is binding on the Comptroller General.

4. Relief for improper payments is granted by the Comptroller General under *31 U.S.C. § 3527(C),* if the payment was not the result of bad faith or lack of due care on the part of the officer. Relief may be denied if collection action has not been diligently pursued.

5. The Comptroller General may order the adjustment of the appropriate fund.

6. If relief is denied, an offset of up to 15% from the accountable officer's salary is specifically authorized by 5 *U.S.C. § 5514* to recover the debt owed as a result of the loss. The offset is required to be initiated immediately

X. BASES FOR RELIEF

A. Relief Is a Matter of Equity and Is Fact Specific.

B. An Accountable Officer Is Strictly Liable, for any Loss or Deficiency.

This raises a rebuttable presumption of Negligence. The accountable officer must affirmatively show that there was no negligence, bad faith, or fraud.

1. Negligence

a. Gross negligence is not required for liability. Simple negligence on the part of the accountable officer is sufficient to bar relief.

b. If there is negligence, it must be the proximate cause of the loss. *B-238123, 70 Comp. Gen. February 27, 1991.* (Failure of clerk to obtain Statement of Claimant, or Treasury report on original check, before issuing successor check was not the proximate cause of the loss. The clerk followed Navy regulations allowing immediate re-issue of checks).

c. The Comptroller General has allowed relief when it is shown that more than one person had access to the funds, or that there is pervasive laxity in the security procedures of the office and that laxity is the proximate cause of the loss. Under either of these conditions, the Comptroller General has found that the loss should not be assigned to any one person. *B-235147.2, August 14, 1991 (unpub); 63 Comp. Gen. 489 (1984).* (The Comptroller General later overruled the earlier decision which found responsibility on the part of the supervisor for lax procedures. *65 Comp. Gen. 876 (1986)).*

d. Relief may not always be granted in cases of pervasive laxity because

(1) an accountable officer has a duty to report security weaknesses to appropriate supervisory personnel,

(2) the officer has the duty to make the best of the security conditions available, however inadequate. Matter of: SGT North, Jr. - Relief of an Accountable Officer, *69 Comp. Gen. 586 (1990).* (The officer, who did not have access to a safe, placed the funds out of sight and locked the room. The Comptroller General relieved him of liability for the funds when the room was burglarized because there was no fault or negligence on his

C. The Use of Due Care Is the Basis of Relief.

Relief will not be granted on the basis of

1. inadequate training or inexperience. However, entrusting funds to an inexperienced or incapable subordinate may make a supervisor equally liable for the loss.

2. hardship of repayment by the accountable officer.

3. heavy workload.

4. an exemplary work history.

D. Statute of Limitations

1. The officer's account is considered settled after the 3 year period prescribed by *31 U.S.C. § 3526*.

2. The Comptroller General is without authority to grant relief after the 3 year period. *B-239802, April 3, 1991 (unpub.).* An agency must therefore report financial irregularities to the Comptroller General within two years of the time it receives a substantially complete account.

3. The Comptroller General has found that the statute of limitations only applies to cases involving erroneous payments made by accountable officers. *60 Comp. Gen. 674 (1981).*

a. The statute does not apply to losses from disbursements involving fraud or criminal activity.

(1) on the part of the accountable officer, by the terms of the statute,

(2) or on the part of the subordinate finance personnel, which are considered physical losses.

b. It does not apply to physical losses.

4. The Comptroller General considers the agency to have received an account at the time the agency's accounts are substantially complete, whether or not they are properly documented or filed, or at the later of

a. when an accountable officer certifies a periodic statement of accountability, or

b. when an agency receives the information placing it on notice that a deficiency exists:

(1) if the deficiency is the result of a duplicate payment or

Section N: Reprogramming

I. INTRODUCTION.

Upon completing this instruction, the student will understand:

A. The Difference Between Reprogramming and Transferring Funds.

B. The Procedural Rules Involved in Reprogramming Funds.

C. The Special Rules Involved in Reprogramming for Military Construction Purposes.

II. REFERENCES.

A. Dep't of Defense Appropriations Act (Annually).

B. Dep't of Defense, Manual *7110-1-M,* Budget Guidance Manual (May 1990).

C. Dep't of the Army, Reprogramming Directive (Oct. 1992).

D. Dep't of Army, Reg. *37-1*, Army Accounting and Fund Control (30 Apr. l991)*[AR 37-1].*

E. Dep't of Air Force, *Reg. 172-1, Volume I, USAF Budget Policies and Procedures (15 Oct. 1990) [hereinafter AFR 172-1, vol. I].*

F. GAO, Principles of Fed. Appropriations Law, *2-25 to 2-28 (2d ed., vol. I, 1992).*

III. DEFINITIONS.

A. Reprogramming Defined.

Reprogramming is the use of funds in an appropriations account for purposes other than those contemplated by the agency at the time of the appropriation. *DOD 7000.14-R, Financial Mgt. Reg., vol. 2A, ch. 1; AR 37-1, para. 6-7; AFR 172-1, vol. I, para. 2-5.*

B. Transfer Defined.

A transfer of budget authority from one appropriation or fund account to another. *DOD 7000.14-R, Financial Mgt. Reg., vol. 2A, ch. 1 (June 1993); AR 37-1, par. 6-10; AFR 172~l,vol. I, para. 2-4.*

IV. REPROGRAMMING DISTINGUISHED FROM TRANSFERS.

A. Transfers.

GAO, Principles of Fed. Appropriations Law, *2-20 (2d ed., vol. 1, 1992).*

1. Transfers shift money between appropriations accounts.

2. There are three types of transfers.

3. Transfers require statutory authority. *31 U.S.C § 1532.*

a. *31 U.S.C. § 1532* prohibits transfers without statutory authority.

(1) Congress provides general transfer authority in each appropriations act.

(2) See, e.g., *Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, §§ 8006-8007, 107 Stat. 1418, 1438 (1993).*

(3) See also Department of Defense Appropriations Act, l994, *Pub. L. No. 103-139, 107 Stat. 1418, 1466-1468,* (authorizing various specific types of transfers).

b. The statutory prohibition applies even though the transfer is intended as a temporary expedient and the agency contemplates reimbursement. To the Secretary of Commerce, *B-129401, 36 Comp. Gen. 386 (1956).*

c. An unauthorized transfer also violates the purpose statute, *31 U.S.C. § 1301(a)* and constitutes an unauthorized augmentation of the receiving appropriation.

d. Exception. *31 U.S.C. § 1534* authorizes an agency to charge temporarily one appropriation for an expenditure benefiting another appropriation of the same agency.

B. Reprogrammings.

GAO, Principles of Fed. Appropriations Law, p. 2-25 (2d ed., vol. 1, July 1992).

1. Reprogramming shifts money within an appropriations account.

a. There is no change in the total amount available in the appropriations account.

b. Reprogramming is not a request for additional funds; rather, it is a reapplication of funds.

2. When Congress appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions on expenditure of the funds. LTV Aerospace Corp., B-183851, Oct. 1, 1975, *55 Comp. Gen. 307, 75-2 CPD ¶ 203.*

3. Subdivisions of an appropriation contained in the agency's budget request or in

6. Items ineligible for reprogramming. ***Department of Defense Appropriations Act, 1994, § 8101, 107 Stat. 1418, 1463 (1993). DOD Manual 7110-1-M, pt. IV, sec. 3, ch. 431; AFR 172-l; vol I, paras. 2-5c(4) and (5).*** **Agencies may not submit actions for:**

a. Items that Congress denied specifically.

b. Any new program, new line item, or increase in quantity or enlargement of scope of existing approved programs after the first year of availability of an appropriation.

V. REPROGRAMMING TYPES.

A. Reprogramming Actions Requiring Prior Congressional Approval.

DOD Manual 7110-1-M, sec. 431.4.A (May 1990); AFR 172-1, vol. I, para. 2-5(c)(1).

1. Any reprogramming that makes use of general transfer authority.

2. Any reprogramming that involves an item designated as a Congressional interest item.

3. Any reprogramming that increases the quantity of a procurement line item authorized by Congress under 10 U.S.C. § 114(a).

B. Reprogramming Actions That Require Congressional Notification.

DOD Manual 7110-1-M, sec. 431.4.A (May 1990). **Any reprogramming that involves moving funds within an appropriation above the thresholds listed below requires Congressional notification.**

1. Military Personnel or Operations & Maintenance: cumulative increases in a budget activity of $10 million or more (e.g., moving funds out of the permanent change of station account into the pay account).

2. Procurement: cumulative increase of $10 million in a procurement line item; addition to the procurement line item data base of a procurement line item of $2 million or more; or creation of a new program with a cost of at least $10 million over its first three years (e.g., increasing the funding level for the Aircraft Carrier Replacement Program).

3. Cumulative increase of $4 million in an RDT&E program, or creation of a new RDT&E program with an annual cost of at least $2 million,or with a cost of at least $10 million over its first three years, e.g., increases in the Ship Self-Development Program.

C. "Internal" Reprogrammings.

D. Below Threshold Reprogrammings.

DOD Manual 7110-1-M, sec. 431.8 (May 1990).

1. Below threshold reprogrammings are those reprogrammings that do not exceed the thresholds identified above, in paragraph V.B., individually or when combined with other below-threshold reprogrammings.

2. Congress performs oversight through the DOD's semiannual submission of its DD 1416, Report of Programs.

E. Letter Notifications.

DOD Manual 7110-1-M, sec. 431.8.E (May 1990).

1. Letter notifications apply to below threshold reprogramming for new programs or line items not otherwise requiring prior approval or notification.

2. The comptroller or budget officer of the component notifies the appropriate House and Senate Committees on Appropriations.

F. Tactical Intelligence and Related Activities (TIARA) Reprogrammings.

Dep't of the Army Reprogramming Directive (Nov. 1989).

1. Generally, the same rules apply as for other reprogramming actions.

2. Special rules apply to TIARA reprogrammings.

a. The Deputy Assistant Secretary of Defense (Intelligence) must be made aware of all adjustments to intelligence programs, to include below-threshold actions, prior to initiation.

b. The agency must obtain prior approval for:

(1) any action that is an item of special congressional interest;

(2) any proposed action that has not been specifically authorized;

(3) any action which could have significant international implications; and

(4) any proposed action that transfers funds between appropriations.

3. Congressional notification is required for actions that exceed established thresholds or represent new starts that exceed thresholds.

VI. MILITARY CONSTRUCTION REPROGRAMMING.

3. *10 U.S.C. § 2854.* Provides permanent authorization for the restoration or replacement of facilities due to natural disasters.

4. *10 U.S.C. § 2672a.* Provides permanent authority to acquire interest in land that:

a. Is needed in the interest of national defense;

b. Is required to maintain the operational integrity of military installations; and

c. Urgency does not permit the delay necessary to include the required acquisition in an annual Military Construction Authorization Act.

5. *10 U.S.C. § 2827.* Provides permanent authority to relocate existing military family housing units from any location where the number of such units exceeds requirements for military family housing to any military installation where there is a housing shortage.

B. Restrictions on Reprogrammings.

DOD Manual 7110-1-M, sec. 432.3.C (May 1990).

1. DOD will not submit a request for reprogramming:

a. For any project or effort that has not been authorized;

b. For any project or effort that has been denied specifically by Congress; or

c. To initiate programs of major scope or base realignment actions, when Congress has not authorized such efforts.

2. Reprogrammings are sent to the House and Senate Armed Services Committees and the House and Senate Appropriations Committees for approval.

a. Generally, committee review process is non-statutory.

b. An agency generally will observe committee review and approval procedures as part of its informal arrangements with the various committees, although they would not be legally binding. *GAO, Principles of Fed. Appropriations Law, l. I, 1992).*

VII. CONCLUSION.

A. The rules governi are detailed and come from many years of inform agreements with the appr s of Congress.

B. Proper application rules will prevent situations from developin lead to stricter Congressional oversight of day-to-day agency operations.

Section P: Current Issues

I. CONTINGENCY OPERATIONS FUNDING

A. Construction

1. Title 10, United States Code, Chapter 169 §§ 2801-2866), Military Construction and Military Family Housing.

2. Title 10, United States Code, Chapter 1, § 101, Definitions, § 101(13), Contingency Operation.

B Operation and Maintenance,

Army funds are the appropriate funding source to acquire materials and/or cost of erection of structures during combat and contingency operations, as defined in *10 U.S.C. § 101(a)(13),* that are clearly intended to meet a temporary operational requirement to facilitate combat operations. Such structures may not be used in all other situations, including all construction used after the termination of the military operations necessitating the construction, except those minor construction projects authorized by *10 U.S.C. § 2805(c).*

C. Weapons

1. Department of *Defense Appropriation Act, 1998, Title III, Procurement of Weapons and Tracked Combat Vehicles, Army.*

2. Operations funds are the appropriate funding source to acquire weapons from indigenous or opposing forces under the "Cash for Weapons" program, rather than the Procurement of Weapons and Tracked Combat Vehicles, Army appropriation.

D. Humanitarian Ass

National Defense scal Year 1993, Section 304 amended Title 10, States Code, by adding *10 U.S.C. § 255* t, that:

"To the extent pr rization Acts, funds authorized to be appr the Department of Defens nanitarian assistance shall be used for the viding transportation of humanitarian relief ian purposes world

II. DISASTER OPERATIONS FUNDING

A. Emergency Response Fund, Defense (DERF)

Department of Defense Appropriations Act, 1990, Pub. L. 101-165, Title V, 103 Stat. 1126, as amended by Department of Defense Appropriations Act, 1994, *Pub. L. 103-139, § 8131, 107 Stat. 1470 (1993):*

"For the 'Emergency Response Fund, Defense,' $100,000,000, to remain available until expended. The Fund shall be available for providing reimbursement to currently applicable appropriations of the Department of Defense for supplies and services provided in anticipation of requests from other Federal Departments and agencies and from State and local governments for assistance on a reimbursable basis to respond to natural or manmade disasters. The Fund may be used upon a determination by the Secretary of Defense that immediate action is necessary before a formal request for assistance on a reimbursable basis is received. In addition to the foregoing, upon a determination by the Secretary of Defense that such action is necessary, the fund may be used, in addition to other funds available to the Department of Defense for such purposes, for expenses of the Department of Defense which are incurred in supplying supplies or services furnished in response. There shall be deposited to the Fund: (a) reimbursements received by the Department of Defense for the supplies and services provided by the Department in its response efforts and (b) appropriations made to the Department of Defense for the Fund. Reimbursements and appropriations deposited to the Fund shall remain available until expended."

B. Stafford Disaster Relief And Emergency Assistance Act

1. *Public Law 93-288, 42 U.S.C. 5121, et seq.*

2. The Federal Response Plan (Frp)

The FRP is a Memorandum of Understanding between FEMA and other Federal agencies which provide domestic disaster assistance, including DOD. The FRP implements the FEMA Director's authority under *E.O. 12148* to "establish Federal policies for, and coordinate, all civil defense and civil emergency planning, management, mitigation, and assistance functions of Executive agencies."

3. 12 Emergency Support Functions (Esf)

a. ESF 3 - Public Works

b. ESF 9 - Urban Search and Rescue

B. The following is derived from guidance issued by the General Counsel of the Department of Defense on August 2, 1993, for the preparation of legal representation letters.

1. A case, XYZ Corp. v. the United States of America, et al., Civil Action No. _____, has been filed in the Eastern District Court of New York. The plaintiff is claiming [insert nature of the case, i.e., damages for/contract claim based on, etc.].

2. The amount being claimed is [insert dollar amount].

3. The case is currently in the [give status of case, i.e., discovery, trial, settlement] stage.

4. The Government plans to vigorously contest this case.

5. We are unable to express an opinion concerning the likely outcome of the case [covers both the possibility of winning or losing the case, and the amount of recovery, if any.]

6. Mr./Ms [insert name(s) of attorney(s)], Department of Justice, _____ Section/Division, [location of office] is representing the Government in this case.

IV. ANTIDEFICIENCY ACT

A. Reporting and Investigating Antideficiency Act Violations.

1. Memorandum,

31 U.S.C. § 1351, 1517; OMB Circular A-34, para. 32-1 DOD 7000.14R. Vol. 14, chs. 4-7;
Memorandum, Principal Deputy Assistant Secretary of the Army (Financial Management and Comptroller), Subject: Supplemental Guidance to *AR 37-1* for Reporting and Processing Reports of Potential Violations of Antideficiency Act Violations (Aug. 17,1995).

2. Flash Report.

The commander of an Army activity at which a suspected violation occurs must send a flash report to DASA(FO) within 15 days of discovering the violation. *DFAS-IN Reg. 37-1, para. 29-13.*

3. Investigations

a. The first step is a preliminary review. The MACOM Commander (or commander at next higher level above the activity where the violation occurred) must appoint a team of experts consisting of an individual with resource management experience, an attorney, and an individual with expertise in the

4. Establishing Responsibility.

a. Responsibility for a violation is fixed at the moment when the improper activity occurs.

b. A responsible party is the person who has authorized or created the overdistribution, obligation, commitment, or expenditure in question. Reports may name commanders, budget officers, or finance officers because of their position if they failed to properly exercise their responsibilities.

c. Generally, the responsible party will be the highest ranking official in the decision making process who had either actual or constructive knowledge of precisely what actions were taken and the impropriety or questionable nature of such actions.

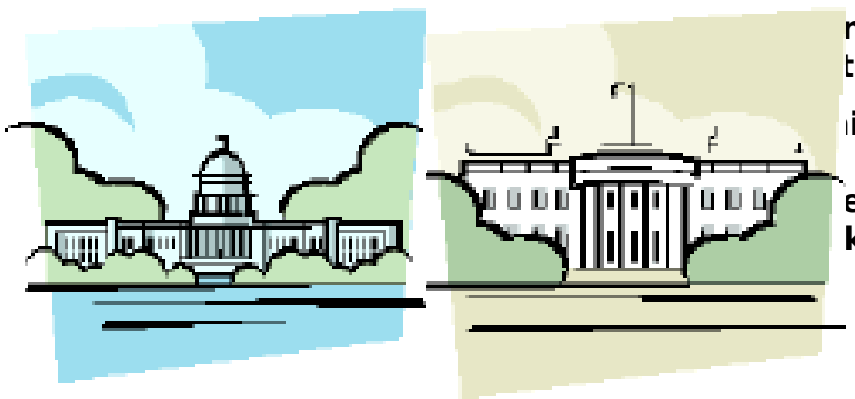
5. Disciplinary Action. **See *DOD 7000.14R, Vol. 14, ch. 9.***

a. Administered on a case-by-case basis. The level of discipline administered to the individual responsible shall be commensurate with the nature and seriousness of the offense, the record of a person responsible, their level of experience, and the degree and level of responsibility of the individual. Any mitigating circumstances will also be considered.

b. The individual who is responsible for determining the appropriate action shall acknowledge in writing that a violation of the Antideficency Act is a violation of Federal statute.

c. The Department is required to report the violation to the President and the Congress of the United States: even though a violation may not have been committed willfully or knowingly that, by itself, does not justify a decision not to administer disciplinary action; and disciplinary action commensurate with the severity of the violation and other fac named responsible tion.

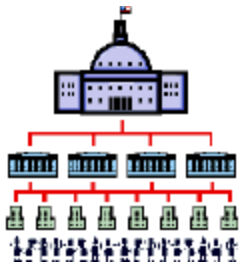
d. ing the appropriate must also e or she believes th ken, or the failure to ta wit



6. Rep

The Secretary of Defense must report to the President and

V. REFERENCES



Commonly Used Reference Materia

A. U.S. Constitution, art. I, § 9, cl. 7

B. Title 10, United States Code (Armed Forces)

C. Title 31, United States Code (Money and Finance)

D. Title 37, United States Code (Pay and Allowances)

E. National Defense Authorization Acts

F. Department of Defense Appropriations Acts

G. Military Construction Appropriation Acts

H. Treasury, Postal Service and General Government Appropriations Acts

I. CONGRESS

1. House Armed Services Committee (HASC),

2. Senate Armed Services Committee (SAC),

3. House Appropriations Committee (HAC),

4. Senate Appropriations Committee (SAC) and

5. Conference Committee Reports with annual authorization and appropriation Acts.

J. Office of Management and Budget (OMB), **Budget of the United States Government**

1. OMB Circular No. A-11, Preparation and Submission of Budget Estimates (Jul. 2, 1992)

2. OMB Circular No. A-34, Instructions on Budget Execution (Aug. 26, 1985)

3. OMB Circular No. A-110, Uniform Administrative Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations (Jul. 1, 1976)

4. OMB Circular No. A-102, Grants and Cooperative Agreements with State and Local Governments (Mar. 3, 1988)

K. Staff of House Committee. on the Budget, **99th Cong., lst Sess., The Congressional Budget: Process: A General Explanation (Comm. Print 1985)**

L. Decisions of the Comptroller General of the United States

Comptroller General of the United States, Standards for Audit of Governmental Organization, Programs, Activities, and

O. Department of Defense (DoD)

1. DoD Directive 7045.14, The Planning, Programming, & Budgeting System (PPBS) (May 22, 1984)

2. DoD Instruction 7045.7, Implementation of the Planning, Programming, and Budgeting System (PPBS) (May 23, 1984)

3. DoD 7710-1-M, Budget Guidance Manual (May 1990)

4. DoD 7220.9-M, Accounting Manual (October 1983)

5. DoD Directive 7200.1, Administrative Control of Appropriations (May 1984)

6. DoD Directive 7250.5, Reprogramming of Appropriated Funds (Jan. 9, 1980)

7. DoD Instruction 7250.10, Implementation of Reprogramming of Appropriated Funds (Jan. 10, 1980)

8. DoD Directive 7250.13, Official Representation Funds (Mar. 12, 1990)

a. Army Reg. 37-100-93, The Army Management Structure (AMS)

b. Army Reg. 37-1, Army Accounting and Fund Control (30 April 1991)
Finance Update, Issue No. 13 (31 July 1990)

c. Army Reg [illegible] tingency Funds of Secretary of the Arm[illegible]

d. Army Reg. [illegible] ursing Operations for Finance and Accounti[illegible]

e. The Judge [illegible] al Law Course Deskbook (May 2000 [illegible] General's [illegible]